



# Are Government Secrecy and Surveillance a Threat to National Security?

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Almost eight years have passed since December 2006, when I spoke at Los Alamos and discussed the Bush administration's priority—following the attacks of September 11, 2001—on countering the proliferation of nuclear weapons. While the president was determined to oust the Taliban from Afghanistan and destroy Osama bin Laden's Al Qaeda, he was also determined to stop “rogue” states and terrorists from acquiring a nuclear weapon and other weapons of mass destruction (WMD), even if it meant resorting to preventive actions like the war in Iraq.

I explored how and why Libya under Col. Muammar Qaddafi had decided to come in from the “nuclear cold” and also abandon his chemical weapons program in the wake of America's invasion of Iraq. Libya's renunciation of WMD, alas, was the sole “success” story in nonproliferation that the administration could claim after discovering that Iraq didn't have unconventional weapons—which I had sadly discovered as the only reporter embedded with the Army unit that had the seemingly endless, miserable task of hunting for and securing Saddam's nonexistent arsenal.

Although it turned out that Saddam didn't have unconventional weapons, Charles Duelfer told us in his meticulous report and subsequent book [*Hide and Seek: The Search for Truth in Iraq* (2009)] that Saddam had preserved the infrastructure and expertise to restore his WMD programs quickly. He fully intended to do that once economic sanctions against his country were lifted. In my speech seven years ago, I argued that unlike Libya, North Korea and perhaps Iran had drawn the opposite lesson from America's foray in Iraq, namely, that possessing a nuclear weapon was the best way of preventing an American or other foreign invasion on their soil. As a result, Pyongyang and Tehran (the latter after an initial suspension of its nuclear program) intensified their quests for entry into the nuclear club following America's Iraqi invasion.





Judith Miller speaking at the 2nd Los Alamos Primer lecture series, held in celebration of the Laboratory's 70th Anniversary. (Photo: Los Alamos)

We were almost all wrong about Saddam's WMD. But some of us may have been right about North Korea, Iran, and other players seeking nuclear weapons under cover of the Nuclear Nonproliferation Treaty.

## **Possessing a nuclear weapon was the best way of preventing an American or other foreign invasion on their soil.**

In his book *The Second Nuclear Age*, author Paul Bracken discusses his disheartening thesis: we have entered a "second nuclear age," which is characterized by a greater number of nuclear-armed players. All these new players, he argues (and I agree, sadly), mean greater political instability and potential for strategic miscalculation and a nuclear exchange—even greater than in the bad, or good, ol' days of the Cold War. When President Bush left office in 2008, there were eight members of the "nuclear club." Now, in President Barack Obama's second term in office, we may well see an expansion of that club, especially if Iran cannot be persuaded to abandon its program. Iran's neighbors are unlikely to permit the non-Arab Persian Shiite state to be the only Muslim country in the Arab Middle East with nuclear weapons.

Given this worrisome tableau, some experts see President Obama's search for dramatic reductions in the U.S.-Russian arsenals as disconnected from the strategic reality that Bracken describes. In fact, Obama's apparent desire to reduce the American strategic arsenal down to 1,000 nuclear warheads

may send a signal the president does not intend: he may be playing a nuclear numbers game at the expense of geopolitical stability.

## **South Korea and Japan are openly debating acquiring nuclear weapons.**

According to Will Tobey and Bill Schneider, stability may actually be undermined by dramatic reductions in America's strategic arsenal. Tobey, for one, has argued that the likelihood of war will not be affected by reducing nuclear arsenals down to 1,000 warheads. And Schneider warns that the administration's utopian aspirations for "nuclear zero" are proceeding in a manner that appears oblivious to what is happening outside of the U.S.-Russia arms control effort. [Tobey is a former deputy administrator for defense and nuclear nonproliferation at the Department of Energy's National Nuclear Security Administration and is now a senior fellow at Harvard's Belfer Center. Schneider now chairs the Pentagon's Defense Science Board.]

There is some evidence, alas, to support such concerns. South Korea and Japan, for instance, are now openly debating acquiring nuclear weapons as their confidence in extended deterrence is strained by America's obsession with heading for zero nuclear weapons. While going to zero may be a worthy goal in and of itself—and I think that 1,000 nuclear weapons are more than enough to protect the homeland—the Obama administration's stated policy may have the unintended consequence of undermining the core goals of the Nuclear Nonproliferation Treaty. It may even help trigger the treaty's demise if countries seek to replicate the deterrence once provided by the United States with their own nuclear weapons.

As a journalist who writes often about national security, I'm struck by how little I've written about nuclear arms negotiations, or arms control in general for that matter, since September 11, 2001. Yes, the attacks highlighted the potential danger to America if Al Qaeda and other like-minded fanatical groups were to obtain WMD. But the attacks also demonstrated the nation's intense vulnerability to suicide bombers and other unconventional attackers armed with the most conventional of weapons—in one example, simple box cutters. As we all know, September 11 sparked the now notorious "global war on terror," which had as much to do with eliminating anti-U.S. militants as with denying them access to the unconventional weapons they were seeking, and continue to seek.

But the point I want to make is that after 9/11, combatting terrorism took center stage in American national security. Terrorism became the first of the "new national security threats," a strategic challenge that nuclear weapons once occupied. Entire sets of "new rules" of the

national intelligence game were written. The intelligence community—indeed, the government itself—reorganized.

**Terrorism resembles the threat of nuclear weapons: the overall numbers may be greatly reduced, but the danger cannot be totally eliminated.**

Consider the Department of Homeland Security, created to oversee the war on terror at home and having some 250,000 employees, half of whom are contractors. That agency, while always somewhat dysfunctional, has remained long after Osama bin Laden and over two-thirds of Al Qaeda's top leadership have left the scene. While the militant Islamic threat itself has metastasized, spreading nodes and like-minded "wannabe's" in nations throughout the world, the threat once posed by "Al Qaeda Central," or "Al Qaeda Core," as terrorism experts call it, has significantly diminished. But the nation's bureaucracy has not yet adjusted to this new terrorism reality. Billions are still being spent, much of it wasted, on fighting an enemy whose capacities have, for the moment, been severely reduced.

President Obama said as much in his speech of May 2013 at the National Defense University. Because Al Qaeda has been on the "path to defeat" in Afghanistan and Pakistan, he said,

the United States had to focus instead on spin-off and peripheral threats: Al Qaeda in the Arabian Peninsula and other networks of foreign and homegrown "violent extremists" that threaten America. All wars end, President Obama said. But the conundrum for any politician is that militant Islamists may not see it that way or may have a different sense of time.

The problem with such a unilateral declaration is that it risks sounding hollow and premature should the *jihadis*, known for their legendary patience, one day acquire the means to inflict major damage, yet again, on an American city or other target. In this respect, terrorism resembles the threat posed by nuclear weapons: the overall numbers may be greatly reduced, but the danger cannot be totally eliminated.

Perhaps that is why the president spoke, yet again, about closing Guantanamo, ending such abuses of human rights as torture (the Bush administration had already promised to end torture), and bringing drone strikes under the rule of law, which he has yet to do.

A second new national security threat against which America has made great strides since 9/11 is biological weaponry. At a cost of over \$7 billion a year since the anthrax attacks less than a month after 9/11, the nation has done much to combat this still much-underrated WMD. The anthrax letter attacks killed 5, infected 17, shut down post offices throughout the Eastern Seaboard, and caused billions of dollars in damage. Since then, strategic stockpiles of drugs and antibiotics have been created and placed at strategic locations throughout the country, air sniffers and sensors have been installed in major cities to more quickly detect the presence of abnormal pathogens in the air, and mail to sensitive locations is routinely scanned for dangerous substances. Hundreds of thousands of first responders and public health officials have been taught to recognize the signs of a biological attack.

The U.S. government has implemented, in whole or in part, most of the measures that Steve Engelberg [of *ProPublica*, formerly of *The New York Times*], Bill Broad [*The New York Times*], and I advocated in our 2001 book, *Germs, Biological Weapons and America's Secret War* (which, by the way, we started writing years before 9/11 and the anthrax attacks). And yet the potential—for good and for evil—inherent in the startling advances of the biotech revolution have still not been fully appreciated by defense planners, and not by most journalists either. Bioterrorism remains an underappreciated strategic threat to the nation, the "also ran" of WMD.

The third strategic "threat du jour" is clearly cyber. Long considered more of a nuisance than a strategic challenge, private and state-sponsored hackers and cyber warriors have now moved onto center stage in national defense. The recent description of the new Cyber Command and its capabilities that General Keith Alexander presented at a national security meeting in Aspen, Colorado, suggests how seriously the Obama administration now takes this threat. The fact that our nation's chief economic rival, China, and one of its most





UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

KLAYMAN et al.,

Plaintiffs,

v.

OBAMA et al.,

Defendants.

KLAYMAN et al.,

Plaintiff,

v.

OBAMA et al.,

Defendants.

Civil Action No. 13-08

**FILE**

DEC 16 2013

Clerk, U.S. District & Bankr.  
Courts for the District of Colo

to  
December 16, 2013 [Dkt. # 13 (No. 13-0851), # 10 (No. 13-0881)]

**MEMORANDUM OPINION**

On June 6, 2013, plaintiffs brought the first of two related lawsuits challenging the constitutionality and statutory authorization of certain intelligence-gathering practices by the United States government relating to the wholesale collection of the phone record metadata of all U.S. citizens.<sup>1</sup> These related cases are two of several lawsuits<sup>2</sup> arising

<sup>1</sup> Plaintiffs' second suit was filed less than a week later on June 12, 2013, and challenged the constitutionality and statutory authorization of the government's collection of both phone and internet metadata records.

<sup>2</sup> The complaint in *ACLU v. Clapper*, Civ. No. 13-3994, which was filed in the United States District Court for the Southern District of New York on June 11, 2013, alleges claims similar to

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-X-  
AMERICAN CIVIL LIBERTIES  
UNION, et al.,  
Plaintiffs,  
-against-  
JAMES R. CLAPPER, et al.  
Defendants.  
-X-USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 12/16/2013

13 Civ. 3994 (WHP)

**MEMORANDUM & ORDER**

WILLIAM H. PAULEY III, District Judge:

The September 11th terrorist attacks revealed, in the starkest terms, just how dangerous and interconnected the world is. While Americans depended on technology for the conveniences of modernity, al-Qaeda plotted in a seventh-century milieu to use that technology against us. It was a bold jujitsu. And it succeeded because conventional intelligence gathering could not detect diffuse filaments connecting al-Qaeda.

Prior to the September 11th attacks, the National Security Agency ("NSA") intercepted seven calls made by hijacker Khalid al-Mihdhar, who was living in San Diego, California, to an al-Qaeda safe house in Yemen. The NSA intercepted those calls using overseas signals intelligence capabilities that could not capture al-Mihdhar's telephone number identifier. Without that identifier, NSA analysts concluded mistakenly that al-Mihdhar was overseas and not in the United States. Telephony metadata would have furnished the missing information and might have permitted the NSA to notify the Federal Bureau of Investigation ("FBI") of the fact

In December 2013 a federal judge in Washington, D.C., deemed the NSA's collection of U.S. telephone records to be likely unconstitutional. But less than two weeks later, a federal judge in New York ruled the collection lawful. This means the Supreme Court will ultimately have to rule on the issue. (Photo: Open source)

ardent ideological foes, Iran, both place enormous priority on this type of warfare highlights its enormous potential for mayhem. Indeed, even our nuclear infrastructure, including government labs such as Los Alamos, have been targeted. Yet the nation's most pronounced vulnerability remains its private sector, which has often resisted government help in shoring up its operating and communications systems against external attacks, which have already materialized.

### The fifth challenge to national security is the administration's "war on leaks."

Fortunately, America also excels at this type of warfare, as seen most dramatically by use of the "Stuxnet" computer worm to slow Iran's centrifuges.

A fourth major national security challenge is climate change—the conservatively correct term for global warming. I won't discuss that today because I haven't covered it.

But I would like to spend the rest of my speech addressing a *fifth* challenge to national security: growing government secrecy and what First Amendment advocates (like me) call the administration's "war on leaks." This is a war not only on the government officials and contactors who leak—and I think many of them who are not whistleblowers are fair game—but also on the reporters who disseminate leaked information and, in the process, ensure that the nation has a free and independent press. The global war on terror may be over, but the Obama administration's war on leakers and the press is not. And this has implications for us as a nation and for the balance between protecting national security and preserving our personal privacy and civil liberties.

Here at Los Alamos, secrecy is paramount, and essential, for obvious reasons. But much of what is now classified in the nation should not be secret. Our government, in the name of national security, has been indulging in a classification orgy—especially since 9/11. But has such secrecy enhanced or impaired national security?

Consider the following: last year the U.S. government classified over 92 million documents as secret. According to the Reporters Committee for a Free Press, the government has been classifying documents as secret at a rate of over 125 a minute. When I first heard that statistic, I thought that was impossible. The government can't do anything that fast! But apparently, it can.

Moreover, according to the National Archives, the government has used some 60 new categories of secret information, many of them created since 9/11, to limit the disclosure and distribution of millions of documents that were once available to the public. Dana Priest [*Washington Post* journalist] and William Arkin [independent journalist] spent two years trying to find out how much was being classified by how many people. And in their articles and a recent book [*Top Secret America: The Rise of the New American Security State*, 2010], they found that nearly a million people—860,000, in fact—have a top-secret clearance, and 1,900 private companies work at the top-secret level. So do another 1,100 federal government organizations. If you were to put all of them on a map, Priest said, you would have over 17,000 locations because a lot of the companies and agencies with this level of secrecy operate out of multiple buildings.

The classification effort is not cheap. In 2004 alone, the government spent \$7.2 billion stamping 15.6 million documents “Top Secret,” “Secret,” or “Confidential.” The costs have risen almost every year. Only in the past two years has the rate of document classification begun to slow.

## **Do we have the right balance between secrecy and civil liberties?**

In my own area, biological terrorism, things that used to be open are now closed, and much of what I thought the public had a right to know is now classified. I doubt very much, for instance, that our book on biological weapons could even have been written if we had started doing our research today. Much of the material we relied on for that book, which actually called upon the government to do more to protect the country from bioterrorist attacks, is now classified.

Overclassification is a serious, underappreciated challenge to our democracy. White House menus at state dinners are virtually classified. So too were the reasons why citizens could be put on a “kill” list without judicial review. The Obama administration, like its predecessors, has had cases thrown out of court after claiming that certain information would compromise state secrets. And the administration has closed meetings that the public used to attend, for example, meetings about the safety of nuclear plants and environmental protection assessments. In 2004, 64 percent of Federal

Advisory Committee meetings were completely closed to the public, according to the Federation of American Scientists’ “Secrecy Project.”

Are we in danger of becoming a national surveillance state? With all that's happened since 9/11, with all that I've discussed here, the question for all of us, including here in Los Alamos, where secrecy is essential, is this: Do we have the right balance between secrecy and civil liberties? Of course the line was destined to shift after our country was forced to declare a war on terrorism, and in a world that may be increasingly filled with nuclear and other WMD, the use of which could kill or injure thousands, if not hundreds of thousands, of our citizens. But even given these dangers, have we gotten that balance right?

## **Overclassification is a serious, underappreciated challenge to our democracy.**

As some of you may know, I went to jail for 85 days in 2005 to protect the identity of a confidential source. But over the past three decades, nearly two dozen journalists have been jailed in the United States for refusing to testify or disclose other types of information, according to the Reporters Committee. Now my former colleague at *The New York Times*, James Rosen [now at Fox News], faces jail for refusing to testify in a criminal trial against a source.

Under the Obama administration, prosecutors have brought forth seven leak-related cases involving journalists—more than double the number brought forth under all previous presidents combined. The administration is also using the 1917 Espionage Act against people who may be whistleblowers—officials who leaked classified information to the press to expose programs that were corrupt, deeply flawed, or (in their view) illegal.

And our government has increasingly resorted to using journalists to identify and testify against those sources. The most egregious example was the recent subpoena for the office, home, and cell phone records of my colleague James Rosen. He wrote a story in 2009 saying that the CIA believed, based on sources inside North Korea, that Pyongyang would test another nuclear bomb if more sanctions were heaped upon it. I can't talk about the details of this case; I can only tell you that Rosen deleted material from his story that might have enabled the North Koreans to identify the government's source. But his emails and telephone conversations with Stephen Kim, a Lawrence Livermore National Laboratory employee on loan to the State Department, helped the government identify Kim as the likely source and indict him. Kim has denied the charges.

But in this case, the government went beyond trying to find and punish a leaker. It sought and secured a warrant from a judge for Rosen's telephone numbers on grounds that he had also allegedly conspired to violate the Espionage Act by "soliciting information" from a government official. The warrant accused him of "flattering a source," that is, doing what journalists do every day, and what a free society depends on us to do to ensure that government does not abuse the enormous power it has acquired, especially given its growing technological prowess. What the Department of Justice was doing, in effect, was criminalizing the act of reporting. Attorney General Eric Holder sought to make reporting a national security crime.

When you start down that road, you are treading on very dangerous ground.

**As a candidate, Obama vowed to support shield law legislation. Then his administration proceeded to help gut the measure that Congress considered.**

Fortunately, from my standpoint, the outcry was so great in the Rosen case—even though the reporter worked for Fox News, which the Obama administration has also tried to delegitimize by saying it is not a news network but an arm of the Republican Party—that Attorney General Holder was forced to back down and issue new guidelines governing leak inquiries. He has pledged to tighten the circumstances in which a reporter's records can be obtained. President Obama, too, said he was "troubled" by this case and has vowed to support a federal shield law that would protect journalists from

having to testify before grand juries if it means compromising their sources in all but the most serious national security leaks. I would have been more impressed by the administration's response if Holder hadn't told Congress that he would never dream of using the Espionage Act against a journalist—until it was disclosed that he had personally signed off on the warrant against Rosen.

As a candidate, Obama vowed to support shield law legislation. Then his administration proceeded to help gut the measure that Congress considered. The shield proposals had become more or less toothless when they were finally doomed by Julian Assange's publication of hundreds of thousands of diplomatic cables and secret military planning documents through Wikileaks.

**What we've increasingly seen since 9/11 is a pattern of government leaks of secret information when it suits an administration's interests.**

Let's be honest. All governments, Republican and Democratic, decry the harm journalists cause by revealing secrets, choosing to blame the messenger for the message. And all governments provide their own leaks when it serves their interests to do so. Leaking is as American as apple pie.

But as Mark Feldstein, director of the journalism program at George Washington University, and many other First Amendment advocates have argued, on balance, far more damage to national security has been caused over the years by government secrecy and deceit than by the press's reporting of secret information. The classic example occurred under John F. Kennedy. At President Kennedy's request, *The New York Times* declined to publish information it had gotten about plans for the Bay of Pigs invasion—and later, after the fiasco unfolded, JFK asserted that it would have been better for the country if the newspaper had disclosed them.

What we've increasingly seen since 9/11 is a pattern of government leaks of secret information when it suits an administration's interests. Consider the leaking of classified sources and methods information about the killing of Osama





bin Laden—which resulted, apparently, in the arrest of a Pakistani doctor who worked with the Americans in locating bin Laden. Consider, too, “unofficial” or “unsanctioned” leaks of national security information in response to both government abuses and the overclassification of information that the public often has a right, and indeed a need, to know. It has been a rule of thumb in American politics: whistleblowers turn to the press to get the truth out when it is being suppressed. And rather than being a threat to American democracy, Feldstein and others argue (and I concur), it is a healthy and self-correcting mechanism.

Especially in times of war and terrorism, the tension between the twin goals of protecting national security, on one hand, while defending civil liberties—and in particular the freedom and independence of the press—on the other hand, is bound to intensify. And so it has. I’m not arguing that some leaks don’t damage national security. I disagree with many of my colleagues who have defended Private Manning, for instance, whose egregious dump of some 750,000 diplomatic cables and secret plans and correspondence has caused enormous diplomatic and personal damage to people who have cooperated with the United States while expecting confidentiality. I also think the publication of details of the Stuxnet computer virus may have hurt American interests. It has been publicly reported that three Iranian technicians were jailed as a result of those leaks. I have not been able to independently verify this.

**No democracy can survive for long without a free, independent, and occasionally irritating and even irresponsible press.**

So I’m not arguing against secrecy per se—especially when it involves nuclear weapons and other WMD expertise and technological developments and operations.

But there is a difference between prosecuting Private Manning and going after Thomas Drake, who sought to expose what many at the National Security Agency considered a wasteful, ineffective program that his agency had embraced. And there is surely a difference between

punishing Private Manning for violating her oath to keep the government’s secrets and, in addition, accusing Julian Assange of Wikileaks with violating the Espionage Act for having published them.

In a democracy there will occasionally be leaks that harm national security. But no democracy can survive for long without a free, independent, and occasionally irritating and even irresponsible press. If anything, given technological advances in the government’s and the private sector’s ability to monitor telephone and electronic communications, the government’s reluctance to curtail the official knee-jerk impulse to classify everything it does, in the name of national security, threatens not only our individual and collective rights, but the very national security the government ostensibly seeks to protect.

It also threatens legitimate secrets like those being kept here at Los Alamos. For if Americans come to distrust the government, how is our national security served? If they are repeatedly told that everything is secret, eventually they will come to suspect the need for even genuine secrets, including those that keep us safe. True national security secrets are jeopardized by the passion for secrecy.

No one has all the answers to these difficult challenges and issues confronting us. But so far, thanks in part to examples like Edward Snowden and Julian Assange, no matter what you think of them, a serious public debate about these issues has finally begun. ✦

*~Judith Miller*